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Proper Venue for an Action When at Least One Defendant Is an Officer or Employee of the Federal Government

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Note: Proper Venue for an Action When at Least One Defendant Is an Officer or Employee of the Federal Government

I. INTRODUCTION

As suits by individuals seeking judicial review of federal administrative decisions have become more prevalent, commentators have given increased emphasis to analysis of the problems that stand in the way of actions against officers and employees of the federal government. The articles which have appeared in the last several years have focused primarily on the problems caused by the remains of the doctrine of sovereign immunity,[1] on the kinds of relief available in an action against a federal defendant,[2] and on the standing of parties to raise controversies and the ability of the courts to resolve them.[3] The purpose of this Note is to focus on a fourth area, one which has been neglected recently in legal journals,[4] but which has generated a great deal of litigation: that of the proper venue for an action in which at least one defendant is a government officer.

For the last eleven years, venue for suits against a federal defendant has been controlled by the liberalized venue provisions of 28 U.S.C. § 1391(e).[5] Since the adoption of Section

1. *See, e.g.*, Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 389 (1970).

2. *See, e.g.*, Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. L.J. 19 (1964).

3. *See, e.g.*, Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Dugan, *Standing to Sue: A Commentary On Injury In Fact*, 22 CASE W. RES. L. REV. 256 (1971); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971).

4. Both Byse & Fiocca, *supra* note 2, and Jacoby, *supra* note 2, discuss the problems of venue for actions against federal defendants prior to 1962 and outline, as does Cramton, *supra* note 1, how the problems were to be solved by the adoption of 28 U.S.C. § 1391(e) as part of the Mandamus and Venue Act of 1962; but none of the articles discusses the case law generated by section 1391(e). An Annotation, 9 A.L.R. Fed. 719 (1971), lists some of the earlier cases decided under the statute but makes no attempt to analyze them.

5. For text of the statute, see note 36 *infra*.

1391(e) as part of the Mandamus and Venue Act of 1962,[6] there has been continual controversy as to whether there are limitations to the availability of the broad venue provisions that are not apparent on the face of the statute. This Note will first briefly summarize the origin of Section 1391(e) with emphasis placed upon the historical problems blocking the suit of government officers in a convenient jurisdiction that the statute was designed to correct. It will then analyze the case law discussing whether the statute extends to cases other than the prototype situation in which a plaintiff, having a substantial complaint against a government officer residing outside of the District of Columbia, is unable to join an indispensable superior officer in the District of Columbia because of lack of proper venue and personal jurisdiction. It is the thesis of this Note that the narrow reading afforded Section 1391(e) by several courts is undesirable.

II. BACKGROUND

Whereas the limitations on the jurisdiction of a federal court represent limitations on its power to adjudicate certain *kinds* of controversies and on its ability to force parties to abide by its adjudication, the federal venue provisions attempt to use the relative convenience of the litigants and witnesses as the criterion for choosing which court of competent jurisdiction should actually try a suit.[7] The choice as to the relative convenience of a forum has been made by Congress for all cases, and thus, although a court has limited discretion to transfer an action to "any other district or division where it might have been brought,"[8] proper venue is fixed by statute.[9] Until the passage

6. Act of Oct. 5, 1962, Pub. L. 87-748, 76 Stat. 744.

7. *See, e.g.*, Denver & R.G.W. R.R. v. Brotherhood of Railroad Trainmen, 387 U.S. 556, 569 (1967); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939). One court has attempted to describe the difference between jurisdiction and venue as the difference between considerations of fairness and convenience: the rules governing jurisdiction are to assure that the defendant has enough contact with a forum so that it is fair to make him answer there, whereas the rules of venue and of discretionary transfer are to assure that the forum in which the action was brought is not so inconvenient as to require that the suit be tried in some other forum of competent jurisdiction. Time, Inc. v. Manning, 366 F.2d 690, 696 (5th Cir. 1966). *See generally* Barrett, *Venue and Service of Process in the Federal Courts—Suggestions For Reform*, 7 VAND. L. REV. 608 (1954).

8. A court has the power to transfer an action to "any other district or division where it might have been brought" if the transfer is for "the convenience of parties and witnesses" and is "in the interest of justice," 28 U.S.C. § 1404(a) (1970), but the Supreme Court has in-

of the Mandamus and Venue Act, proper venue in an action against a federal defendant was determined solely by the appropriate "general" federal venue statute.[10] Although an action in the federal courts based solely on diversity of citizenship could be maintained in the district of residence of either the plaintiff or the defendant, an action against a government employee sued in his official capacity almost always presented a federal question. Proper venue for federal question suits was limited to the district of the defendant's residence.[11]

A. Some Problems Prior to the Passage of the Mandamus and Venue Act

The restriction of proper venue to the district of the defendant's residence in federal question actions created an undue burden on the plaintiff when the defendant was either a corporation or a federal officer. Prior to 1948, proper venue for an action against a corporate defendant lay only in its state of incorporation even though a court in any other state in which the

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terpreted "in any district . . . where it might have been brought" to restrict transfer to districts in which venue would have been proper had the suit been initiated there originally. Hoffman v. Blaski, 363 U.S. 335 (1960).

9. *See, e.g.*, Olberding v. Illinois Central R.R., 346 U.S. 338, 340 (1953): "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."

10. The general federal venue statute was adopted as part of the Act of March 3, 1887, ch. 373, 24 Stat. 552 (errors introduced in the printing of the 1887 Act were corrected by the Act of August 13, 1888, ch. 866. 25 Stat. 443). As amended, the provisions are codified as 28 U.S.C. § 1391(a)-(b) (1970).

11. The Act of 1887 amended the venue provisions adopted as part of the Act of March 3, 1873, ch. 137, 18 Stat. 470 (1875), which in essence made venue proper in any district in which the defendant could be served with process. There is nothing in the legislative history of the Act of 1887 to suggest why the venue provisions were changed. However, courts have assumed that "abuses engendered by this extensive venue" (Stonite Products Co. v. Melvin Lloyd Co., 315 U.S. 561, 563 (1942)) prompted amendments which had as their purpose to "save defendants from inconveniences to which they might be subjected" by venue provisions which compelled a defendant to answer in any district in which he could be served with process. General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 275 (1922). Thus, the basis for the interpretation given the general federal venue statute is that venue is a means of protecting the defendant against suit in a distant forum.

In 1966 the general federal venue statutes were amended by the Act of Nov. 2, 1966, Pub. L. 89-714, 80 Stat. 1111, which allowed both diversity and federal question actions to be maintained in the district in which the "claim arose."

corporation did business would have personal jurisdiction over it.[12] The effect of so restricting proper venue was to make it impossible to force a corporation to accept venue outside of its state of incorporation[13] at a time when the interstate activities of corporations were rapidly expanding.[14]

A similar, but more complex, problem was presented when the defendant was a federal officer sued in his official capacity. If the action named only a local subordinate government employee, the plaintiff was often faced with the possibility that the subordinate's ultimate superior would be ruled to be an indispensable party and the action dismissed without his joinder.[15] The indispensable superior problem had two aspects: 1) the superior was not usually amenable to service of process outside of the District of Columbia and therefore a court in the field lacked personal jurisdiction over him,[16] and 2) even if personal jurisdiction could be obtained, the superior could interpose the general federal question venue statute that set venue only in the district of the defendant's residence.[17] In the case of the indispensable superior who was often an agency or department head, the only proper venue was the district of the agency or department headquarters, which in almost every case was located in Washington, D.C.

Despite repeated Supreme Court attempts at clarification, there was hopeless confusion as to exactly when a superior offi-

12. Prior to the adoption of the "general" federal venue provisions in 1887, a corporation could be forced to accept venue in any state in which it had appointed an agent in compliance with a state-imposed requirement for the privilege of doing local business. *See Ex parte* Schollenberger, 96 U.S. 369 (1877).

13. In one case, the Supreme Court ruled that an action alleging infringement of trade mark could not be maintained in the Southern District of New York when the defendant corporation was incorporated under the laws of Massachusetts even though the defendant's principal place of business was located in New York City. *In re* Keasbey & Mattison Co., 160 U.S. 221 (1895). This doctrine was partially abrogated in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939), and by the amendment of the federal venue statute in 1948.

14. *See* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 170 (1939).

15. *See, e.g.,* Martinez v. Seaton, 285 F.2d 587 (10th Cir. 1961); McNeil v. Leonard, 199 F. Supp. 671 (D. Mont. 1961).

16. *See, e.g.,* Blackmar v. Guerre, 342 U.S. 512 (1952); Butterworth v. Hill, 114 U.S. 128 (1885); Stroud v. Benson, 254 F.2d 448 (4th Cir. 1958).

17. In actions against federal officers sued in their official capacity, residence meant official residence. *See, e.g.,* Smith v. Farley, 38 F. Supp. 1012 (S.D.N.Y. 1936).

cer was indispensable.[18] It was sometimes possible to enjoin a local officer from enforcing a superior's decision if in making the decision the superior had exceeded his statutory authority.[19] But it was almost never possible to force a subordinate to lease federal land[20] or reinstate a discharged federal employee,[21] even though the superior had nothing to do with the actual decision. However, these were the administrative determinations most frequently involved in litigation.

The problem of the indispensable superior was exacerbated by the rulings in two early Supreme Court cases which, when read together, held that only the District Court for the District of Columbia had the original subject matter jurisdiction necessary to issue writs of mandamus.[22] Because effective judicial review of federal administrative decisions often required that mandamus issue,[23] the restriction of mandamus power to the Dis-

18. *See generally*, Davis, *Government Officers as Defendants: Two Troublesome Problems*, 104 U. PA. L. REV. 69 (1955); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 924-28 (1957).

19. *But see* Paolo v. Garfinkel, 200 F.2d 280 (3d Cir. 1952), where the court refused to review a deportation order when the Commissioner of Immigration and Naturalization Service was not a party because any relief ordered would be effective only in the state in which the court ordering the relief sat. Several years later, the Supreme Court overruled the *Peolo* decision in Shaughnessy v. Pedreiro, 349 U.S. 48 (1955), in which it stressed the hardship of making an alien travel to Washington to challenge his deportation.

20. *See, e.g.*, McNeil v. Leonard, 199 F. Supp. 671 (D. Mont. 1961).

21. *See, e.g.*, Blackmar v. Guerre, 342 U.S. 512 (1952).

22. In McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), the Supreme Court held that Congress had never granted the lower federal courts original jurisdiction to issue writs of mandamus. However, in Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524 (1838), the Court ruled that mandamus was one of the common law powers retained by the United States District Court for the District of Columbia which had been given the powers of the court of the State of Maryland when the District was created from land donated by Maryland in 1801.

23. Alternately, a plaintiff could request injunctive or declaratory relief. But if he wanted to force the defendant to perform some positive act, *e.g.*, to lease him land or to reinstate him in a government position from which he had been dismissed, a request for an injunction was treated as a request for a mandatory injunction which many courts thought of as similar in all essential respects to mandamus and therefore would not order it. *See, e.g.*, Johnson v. Interstate Power Co., 187 F. Supp. 36 (D.S.D. 1960); Callaway County Agricultural Stabilization and Conservation Comm. v. Missouri Agricultural Stabilization and Conservation Comm., 122 F. Supp. 541 (W.D. Mo. 1954); Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947). *But see* Bowles v. Skaggs, 151 F.2d 817 (6th Cir. 1945). Furthermore, a declaratory judgment was not sufficient because it did not by itself command the federal officer to perform the requested action. Marshall v. Crotty, 185 F.2d 622 (1st Cir. 1950).

trict Court for the District of Columbia frequently meant that an administrative determination could be challenged only there. Thus, whether or not a superior residing in Washington was an indispensable party, relief in a court more convenient for the plaintiff than that for the District of Columbia was often not possible.

These problems are well illustrated by the case of *Richman v. Beck*[24] in which the plaintiff, alleging that he had been improperly denied a permit to trail his sheep over public land, brought an action against local range management officials seeking, *inter alia*, a mandatory injunction commanding the issuance of a permit for crossing public lands. The trial court ordered that the permit be issued, but the Court of Appeals for the 10th Circuit reversed. Even though the actual decision as to whom a permit would be issued was made by the local range manager in conjunction with an advisory board of local land owners, the court held that the Secretary of the Interior was an indispensable party. The court reached its decision of indispensability because the statute which provided for the issuance of trailing permits[25] vested "the power to grant to owners of land adjacent to a grazing district . . . rights of way over lands included in the district . . . in the Secretary of the Interior."[26] Since joinder of the Secretary was not possible because of lack of proper venue and personal jurisdiction over him, the action had to be dismissed. But even had the Secretary appeared voluntarily and waived objection to improper venue, it is doubtful that the court could have granted effective relief without the power to order mandamus. In demanding a permit,[27] plaintiff attempted to force the defendant to perform a duty allegedly owed to him. That, traditionally, could not be done without mandamus.[28]

B. THE LEGISLATIVE HISTORY OF THE MANDAMUS AND VENUE ACT

The legislative history of the bill which was to become the

24. 257 F.2d 575 (10th Cir. 1958).
25. 43 U.S.C. § 315 *et seq.* (1970).
26. 257 F.2d at 579.
27. Although several remedies were requested, the plaintiff argued that he primarily desired a judgment restraining local officials of the Bureau of Land Management from interfering with his trailing rights. However, the court concluded that without a permit, the plaintiff had no right to trail his sheep. *Id.* Therefore, effective relief would have required the court to order the secretary to issue a permit.
28. *See* note 23 *supra* and accompanying text.

Mandamus and Venue Act of 1962 is relatively sparse.[29] As originally introduced by Representative Budge of Idaho, the bill attempted to circumvent the problem of the indispensable superior by amending the federal question venue provisions so as to allow an action against a federal officer sued in his official capacity to be maintained in the district of the plaintiff's residence.[30] Reintroduced in the next Congress,[31] the bill succumbed to the Department of Justice's objection that expanding venue for actions against federal defendants would not alone facilitate judicial review of administrative action because the district courts in the field would still lack the power to issue writs of mandamus. Therefore, although the district courts would be able to hear the suits, they would be unable to give effective relief.[32] In response to the criticisms of the Justice Department, a new draft of the bill was introduced. The draft empowered the district courts with "original jurisdiction of any action to compel an officer or employee of the United States or any agency thereof to perform his duty."[33] Reintroduced in the next Congress, and subjected to minor modifications in the Senate,[34] the bill became law on October 5, 1962. The mandamus portion of

29. There was no debate on either the House or Senate floor. *See generally* Byse & Fiocca, *supra* note 2. Much of the following history of the Act closely follows the discussion of Professor Byse.

30. H.R. 10892, 85th Cong., 2d Sess. (1958). Service of process on the absent superior was to be effectuated by service on the local United States Attorney or his designee.

31. H.R. 10089, 86th Cong., 2d Sess. (1960).

32. Letter from Lawrence E. Walsh, Deputy Attorney General, to Chairman of the House Judiciary Committee, undated, in H.R. REP. No. 1936, 86th Cong., 2d Sess. 5-6 (1960). The Department of Justice also recommended that service of process by registered mail be made on the Attorney General and on the officer being sued.

33. H.R. 12622, 86th Cong., 2d Sess. (1960). A suggestion by the Judicial Conference of the United States that venue also be made proper in the district in which the cause of action arose and in the district in which any real property involved in the action was located was also adopted. *See* Letter from Warren Olney, Director, to the Chairman of the House Judiciary Committee, May 3, 1960, in H.R. REP. No. 1936, 86th Cong., 2d Sess. 5 (1960).

34. In response to continued criticism from the Department of Justice, the "jurisdictional" grant to the district courts was reworded so as to clarify that the grant of jurisdiction to hear suits to compel federal defendants to perform their duties (mandamus power) did not give the district courts the power to order a government officer to act contrary to his discretion. The venue section of the Act was also changed. The liberalized venue provisions were made available only if there was no specific venue for the action otherwise provided by law. The provisions were also changed so that venue would be proper in the district of the plaintiff's residence only if there was no real property involved in the action.

the new act became 28 U.S.C. § 1361. The venue-service of process section was codified as subsection (e) of the general federal venue statute 28 U.S.C. § 1391.

C. SECTION 1391(e)

As long as there was not already a "special" venue statute controlling venue for the particular action,[35] Section 1391(e) provided four possible venues for any "civil action" in which "each defendant" was either an agency of the United States sued by name or "an officer or employee of the United States or any agency thereof acting in his official capacity."[36] Venue was made proper in the district of the defendant's residence, as was true under the general federal question venue statute. Additionally, venue was made proper in the district in which the claim arose,[37] and in the district in which any real property involved in the action was located. But the most important feature that distinguished the new venue provisions from the general federal question venue statute was that venue was also made proper in the district of the plaintiff's residence if there was no real property involved in the action. In addition, the statute provided for extra-territorial service of process so as to enable a plaintiff to bring an absent federal defendant before any court in which venue would be proper.

Although the original bill clearly was prompted by the problems caused by the doctrine of the indispensable superior, the language of Section 1391(e) was much broader than that which would have been necessary to allow a plaintiff to proceed against

35. For a discussion of the "except as otherwise provided by law" language, see text accompanying note 127 *infra*.

36. More fully set out, 28 U.S.C. § 1391(e) (1970) reads:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or any agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.
>
> The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

37. Amendments in 1966 also made venue proper in the district in which the claim arose under the general federal venue statute. *See* note 11 *supra*.

a subordinate officer in the field.[38] The very breadth of the language made it possible to interpret the venue provisions as if they made proper venue for an action against a federal employee turn primarily on the convenience of the plaintiff. Unfortunately, neither the House[39] nor Senate Judiciary Committee reports[40] made it clear whether Congress had intended such a radical departure from the traditional conception of venue as protection for a defendant against suit in a distant forum.

On one hand, both the House and Senate reports recognized that actions against government officers were in essence actions against the United States which would be defended by a local United States Attorney wherever the action was brought.[41] They both concluded, therefore, that "[r]equiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition."[42] The Senate report went on to suggest that venue provisions which required the citizen-plaintiff to bring his suit in a location convenient for the federal defendant was "to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government."[43] Thus, at least part of the legislative history of the Mandamus and Venue Act, although certainly not inconsistent with a narrow reading of the statute's purpose, can be and has been read[44] to support the position that Congress considered the convenience of the federal defendant to be of only secondary importance.

On the other hand, both reports disclaimed any intention that the Act was to give access to the federal courts for any action which could not already have been maintained in the United States District Court for the District of Columbia.[45] Since only

38. For example, Congress might have solved the problems created by the doctrine of the indispensable superior by making it unnecessary to join a superior who had not participated actively in the making of the disputed determination, instead of amending venue provisions which seem to apply to all federal officers.

39. H.R. REP. No. 536, 87th Cong., 1st Sess. (1961) [hereinafter cited as H.R. REP.].

40. S. REP. No. 1992, 87th Cong., 2d Sess. (1962) [hereinafter cited as S. REP.].

41. *Id.* at 3; H.R. REP. at 3.

42. S. REP. at 3; H.R. REP. at 3.

43. S. REP. at 3.

44. *See* cases cited in note 82 *infra*.

45. S. REP. at 2; H.R. REP. at 2.

the one specific problem of an indispensable superior residing in Washington who was needed in a local action against a subordinate employee was before Congress, the disclaimer coupled with the lack of any real affirmative evidence of a broader purpose suggests that the statute should be construed to apply only to the prototype fact situation that led to its passage. Much of the controversy generated by Section 1391(e) has turned on whether or not the statute is to be interpreted so narrowly.

III. JUDICIAL INTERPRETATION OF SECTION 1391(e)

The issues presented in the cases which have discussed whether Section 1391(e) extends to fact situations other than the prototype are roughly classifiable into five categories.[46]

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46. An additional area of conflict which primarily involves the interpretation to be given 28 U.S.C. § 1391(c) concerning corporate venue is beyond the scope of this note. The litigation in such cases turns on whether the combination of sections 1391(c) and (e) allows a corporation to set venue for suits against federal defendants in any district in which it does business. Underlying the issue is the question of whether the section 1391(c) definition of corporate residence applies to a corporation as plaintiff as well as to a corporation as defendant. For a discussion of the section 1391(c) aspects of the problem, see Manchester Modes, Inc. v. Schuman, 426 F.2d 629 (2d Cir. 1970); for the problem in the section 1391(e) context, see Abbott Laboratories v. Celebrezze, 228 F. Supp. 855 (D. Del. 1964). *See also* Annot., *supra* note 4.

Another question which previously arose under section 1391(e) has subsided. It is now generally held that the statute gives a court personal jurisdiction over a federal defendant who cannot be served with process within a district in which venue is proper. In its report, the House Judiciary Committee explained that in order to give effect to the broadened venue provisions of section 1391(e), it was necessary to modify the service of process requirements of the Federal Rules of Civil Procedure so as to allow for service beyond the territorial limits of the state in which the action was brought. H.R. REP., *supra* note 39, at 2. In United States *ex rel.* Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969), the only case to hold otherwise, the Second Circuit was apparently mislead by the classification of section 1391(e) as a venue statute. Less than a year later, the Second Circuit explained without mentioning *Rudick* that the purpose of section 1391(e) was to broaden the venue and service of process provisions "so that when a superior officer residing in Washington was a necessary party the action could still be brought in the field, with personal jurisdiction over the superior obtainable by service of process by mail . . . ." Liberation News Service v. Eastland, 426 F.2d 1379, 1384 (2d Cir. 1970).

There is one line of cases, however, all decided by one judge of the District Court for the Western District of Missouri, which holds that section 1391(e) provides for extra-territorial service of process only in petitions for writs of mandamus. The cases all involve one prisoner's attempts to extract himself from a federal penitentiary. Langston v. Ciccone, 313 F. Supp. 56 (W.D. Mo. 1970); Ott v. Ciccone,

There has been conflict concerning: 1) whether the liberalized venue provisions of the statute are available at all when a non-federal defendant is joined in an action against a government officer; 2) whether the venue provisions are available only in actions against government employees who serve administrative functions—*e.g.*, against the head of an executive department and not against a member of Congress; 3) whether the venue and service of process provisions are available when an absent employee who is not a superior officer residing in Washington is an indispensable party; 4) whether a plaintiff, by naming as a nominal defendant a local officer who has not participated in the disputed administrative determination, can use the "district of the defendant's residence" provision to set venue in the district most convenient for himself; and 5) whether the liberalized venue and, more importantly, the extra-territorial service of process provisions of the statute are available in an action to obtain a writ of habeas corpus.

A. Actions In Which at Least One Defendant is Not a Federal Employee

The origin of the clause of Section 1391(e) which limits the applicability of the statute to actions "in which each defendant is an officer or employee of the United States" is something of a mystery.[47] Although there is no evidence in the legislative history to support his point of view, one commentator has speculated that the clause was inserted because the Department of Justice preferred to have federal interests resolved in actions in which it could maintain control over the joinder of related parties and issues.[48] If "each defendant" is given its logical meaning of *every* or *all defendants*, then absent a Justice Department waiver,[49] Section 1391(e) cannot be used to set venue for any defendant when federal and non-federal defendants are joined in the same action.

Some courts, however, considered the interpretation urged

326 F. Supp. 609 (W.D. Mo. 1970); Ott v. United States Board of Parole, 324 F. Supp. 1034 (W.D. Mo. 1971).

47. No mention of its origin was made in either the House or the Senate reports.

48. *See* Cramton, *supra* note 1, at 463.

49. According to Professor Cramton, United States Attorneys are told that they are not authorized to waive objections to third party joinders without first obtaining clearance with the Department of Justice Civil Division which will in turn clear them with the agency involved. Cramton, *supra* note 1, at 463.

by the Department of Justice to violate the "spirit and intent" of what they felt was a plaintiff oriented statute.[50] They urged that the effect of making Section 1391(e) unavailable was to "whipsaw" the plaintiff out of his cause of action. If the extra-territorial service of process provision of the statute was not available so as to make it possible to bring an action in the field against both a government officer headquartered in Washington and a non-federal defendant, there was often no jurisdiction in which the plaintiff could proceed. Whereas the federal officer was amenable to service of process only in the District of Columbia, the non-federal defendant was subject to suit only in an outlying district.[51]

Although courts have been uniformly troubled by this "whipsaw effect," their response has varied greatly. For example, in *East New Haven v. Eastern Airlines*,[52] an action which required the joinder of the Town of East New Haven, two airlines and the administrator of the Federal Aviation Agency, a Connecticut district court found the non-application of Section 1391(e) to actions in which all defendants were federal employees to be "without justification where there [was] independent authority for service of process and venue with respect to each non-government party joined as a defendant."[53] Nevertheless, in the light of what the court considered to be the unambiguous language of the statute, it felt compelled to sever the plaintiff's action against the federal defendants. In *Powelton Civic Home Owners Association v. Department of Housing and Urban Development*,[54] however, the district court thought that it was "absurd to conclude that the operative force of [Section 1391(e) was] abrogated by the presence of an additional defendant who [could] be adequately served within the power of Rule 4(f)."[55]

50. Powelton Civic Home Owners Ass'n v. Department of Housing & Urban Dev., 284 F. Supp. 809 (E.D. Pa. 1968). *See* Heath v. Aspen Skiing Corp., 325 F. Supp. 223 (D. Colo. 1971); Macias v. Finch, 324 F. Supp. 1252 (N.D. Cal. 1970); Brotherhood of Locomotive Eng'rs v. Denver & R.G.W. R.R., 290 F. Supp. 612 (D. Colo. 1968). *But see* Stinson v. Finch, 317 F. Supp. 581 (N.D. Ga. 1970); East New Haven v. Eastern Airlines, Inc., 282 F. Supp. 507 (D. Conn. 1968); Benson v. Minneapolis, 286 F. Supp. 614 (D. Minn. 1968); Chase Savings & Loan Ass'n v. Federal Home Loan Bank Bd., 269 F. Supp. 965 (E.D. Pa. 1967).

51. Powelton Civil Home Owner's Ass'n v. Department of Housing & Urban Dev., 284 F. Supp. 809, 833 (E.D. Pa. 1968). *See* 2 J. MOORE, FEDERAL PRACTICE ¶ 4.29, at 1209-10 (2d ed. 1966).

52. 282 F. Supp. 507 (D. Conn. 1968).

53. *Id.* at 511.

54. 284 F. Supp. 809 (E.D. Pa. 1968).

55. *Id.* at 834.

It interpreted the relevant language of Section 1391(e) to mean that the extra-territorial service of process provision was available only when each defendant who could not otherwise be served under Federal Rule 4(f) was a federal officer.[56]

It is difficult to harmonize the cases which allow the use of Section 1391(e) in actions where there is joinder of non-federal defendants with the unambiguous statutory language. But, absent a vital federal interest, it is more difficult to rationalize why Congress would have intended to distinguish plaintiffs whose action required the joinder of non-federal defendants and thereby jeopardize their cause of action. The burden placed on the Department of Justice by having to defend an action in which there are additional parties cannot be compared with the burden placed on the plaintiff who is left with no forum in which to redress his grievances.[57] Thus, in spite of the interest of the Justice Department in controlling the joinder of additional parties, the view of the court in *Powelton* is preferable to a more literal reading of the statute because it prevents the Government from obtaining what is in effect a *de facto* procedural immunity from suit under the guise of control of litigation for its own convenience in resolving federal interests.

B. Definition of Federal Officer or Agency

The judicial interpretations which limit the availability of Section 1391(e) to actions against federal defendants who serve administrative functions, like those which allow the use of the statute when federal and non-federal defendants are joined in the same action, are based on the statute's legislative history rather than on language in the statute itself. Both the House and Senate reports stated that "officer or employee of the United States or any agency thereof acting in his official capacity" should be taken to mean an employee of "any department, independent establishment, commission, administration, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest."[58] Despite this broad

56. *Id.*

57. One commentator has suggested that if the "each defendant" limitation is read literally, one result will be that a plaintiff would have no forum in which to challenge the failure of the government to lease federal land to him rather than to someone else, because the party to whom the land actually was leased would be as indispensable as the Secretary of the Interior. Cramton, *supra* note 1, at 464.

58. S. Rep., *supra* note 40, at 4; H.R. Rep., *supra* note 39, at 4.

language, some courts have removed employees who are not working for an independent agency or the executive branch of the Government from the scope of the statute.[59]

The justification for excluding officers of the judicial and legislative branches from the reach of 1391(e) is that the statute was adopted primarily because of the difficulty of reviewing administrative determinations under the general federal question venue statute.[60] Because the federal judiciary and members of Congress only infrequently make decisions that are reviewable in the sense that an administrative determination is subject to judicial review, it is arguable that Section 1391(e) is not meant to apply to such officials absent specific mention of them in the statute's legislative history.[61]

The only case in which the issue of the applicability of Section 1391(e) to non-administrative employees has arisen is *Liberation News Service v. Eastland.*[62] In that case the plaintiffs[63] sought to quash subpoenas issued by the Subcommittee on Internal Security of the Senate Committee on the Judiciary which had ordered the plaintiffs' bank to disclose records relating to their bank accounts. Named as defendants were all the members of the Senate Subcommittee on Internal Security and its chief counsel, none of whom were amenable to suit in the Southern District of New York unless Section 1391(e) applied, and the plaintiffs' bank, the Chemical Bank New York Trust Company.[64] After a careful review of the legislative history of Section 1391(e), the Second Circuit dismissed the action for improper venue and lack of personal jurisdiction over the Subcommittee members and chief counsel. The Mandamus and Venue Act of 1962 had been passed with two sections, 28 U.S.C. § 1361 which gave the district courts mandamus power, and Section 1391(e) which liberalized venue and service of process when the defendant was a federal employee. Thus, the court reasoned that it was probable that Congress meant the new venue and service

59. *See, e.g.,* Liberation News Service v. Eastland, 426 F.2d 1379 (2d Cir. 1970).

60. S. REP. at 1, 2.

61. *See* note 69 *infra.*

62. 426 F.2d 1379 (2d Cir. 1970).

63. Plaintiffs were the Liberation News Service which described itself as "a wire service to the radical and underground press," and the New York Regional Office of Students for a Democratic Society, "an association of young people of the left."

64. Although the court does not mention the issue, it is interesting to note that in *Liberation News Service* both federal and nonfederal defendants were named. *See* text accompanying notes 47-57, *supra.*

of process provisions to apply only in actions against the kind of government employees who could be compelled to perform duties owed to a plaintiff by way of mandamus. The court did not believe that a member of Congress could be so compelled.[65]

The Second Circuit's attempt to use the mandamus section of the Mandamus and Venue Act to restrict the applicability of the venue and service of process provisions of Section 1391(e) is not clearly justified by the legislative history of the Act. As originally introduced, the bill was solely concerned with facilitating judicial review of federal administrative action by liberalizing venue and service of process.[66] The grant of mandamus power to the district courts was added only after the Department of Justice pointed out that the district courts would often find themselves unable to give effective relief without such power in the suits that they would now be able to hear.[67]

But behind the court's decision was a far more basic consideration. The court realized that unlike many administrative and executive actions where the disputed decision was often made in the field, Congressional committees operated primarily in the capital. It was afraid that the "disruption to the work of Congress by the pendency of actions elsewhere than in Washington" would be far more serious than in the case of executive departments and agencies with their large and scattered staffs.[68] Although the actions of a Congressman could admittedly cause damage to citizens in distant areas of the country, the court felt that in order to protect the easily inconvenienced legislative defendant, it was necessary that venue for actions against him be controlled by the general federal venue statute rather than by the more plaintiff oriented provisions of Section 1391(e).

Two points were made clear by the interpretation of Section 1391(e) in *Liberation News Service*. First, where the legislative history is not clear as to the applicability of the statute,[69] the court would resolve the ambiguity by balancing the convenience of the federal defendant against that of the citizen

65. 426 F.2d at 1384.
66. *See* text accompanying notes 29-34, *supra*.
67. *See* text accompanying note 32 *supra*.
68. 426 F.2d at 1384.
69. The court in *Liberation News Service* could find no "word in the five year gestation period of § 1391(e)" which indicated that Congress directly intended that the statute apply to legislative "employees." 426 F.2d at 1384.

plaintiff. Second, it would give no less weight to the defendant's convenience merely because he was a government employee. Because the traditional definition of venue had been in terms of the defendant's residence, the court held that Section 1391(e), which allowed for venue at the residence of the plaintiff, was to be narrowly construed.

C. Applications of Section 1391(e) in Situations Other Than the Prototype

Neither the House nor the Senate reports suggest that the availability of Section 1391(e) depends on the district of residence of the federal defendant.[70] However, some courts have used the balancing criteria of *Liberation News Service* to determine whether the liberalized venue and service of process provisions of Section 1391(e) are available in two situations. First, the test has been used when a superior or other indispensable official resides outside of the district in which the action is brought but not in the District of Columbia. Second, it has also been used when the local defendant is only a nominal party, the action being brought in a forum favorable for the plaintiff but where neither the cause of action arose, nor where the plaintiff or the "actual" defendant reside.

1. *Local Agencies*

In *Natural Resources Defense Council, Inc. v. Tennessee Valley Authority*,[71] three environmental protection organizations[72] brought suit in the District Court for the Southern District of New York seeking both declaratory relief and an injunction prohibiting the Tennessee Valley Authority and its chairman from purchasing strip mined coal from producers in the Tennessee-Kentucky region.[73] Defendants objected to the New York venue, arguing, *inter alia*,[74] that Section 1391(e) was not meant

70. *See* text accompanying note 58 *supra*.

71. 459 F.2d 255 (2d Cir. 1972).

72. Plaintiffs were the Natural Resources Defense Council, Inc., a New York membership corporation having its principal place of business in the Southern District of New York; the Environmental Defense Fund, Inc., a New York membership corporation having its principal place of business in the Eastern District of New York; and the Sierra Club, a California membership corporation having its principal place of business in the Northern District of California.

73. The complaint alleged that the defendant violated various federal statutes and regulations by pursuing its "policy of purchasing and burning huge quantities of strip-mined coal." *Id.* at 256.

74. Among the other objections was that section 8(a) of the Ten-

to apply to an action against a regionally based federal business corporation such as the TVA. Looking to the legislative history of Section 1391(e), the Second Circuit noted that the problem of the indispensable superior had been a bar to convenient suit primarily in cases of agencies headquartered in the District of Columbia. Thus, the court concluded that this problem did not make the "essentially local", albeit federal, TVA subject to suit outside of the area of its activity.[75] Further, the court reasoned that the TVA had always been suable subject to the same venue limitations as any other corporation and that "[u]nlike the local postmaster or federal land agent . . . could never have defeated venue . . . on a plea that the suit would lie only in the District of Columbia . . . ."[76] The Second Circuit thus rejected the plaintiffs' more general contention that it had been the intent of Congress to make all federal agencies uniformly suable anywhere in the United States that a plaintiff might reside.

Although the Second Circuit emphasized the uniqueness of the Tennessee Valley Authority, stating that it "operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington,"[77] the court's reasoning extends naturally to situations other than the narrow area of federal business corporations. Indeed, the reasoning affirms the rationale of the earlier federal district court decision, *Holicky v. Selective Service Local Board No. 3*,[78] in which the plaintiff challenged a military induction order originated by his Illinois draft board in a district court in Colorado, the district of his residence. Although the plaintiff in *Holicky* was a resident of Colorado and was to be inducted there, the court found that his draft board in Illinois was an indispensable party since he was under the control of the Colorado board only because of the induction ordered in Illinois. In considering the availability of Section 1391(e), the court asserted that the most plausible view of what Congress intended when it amended the venue provisions was that citizens should be able to bring suit elsewhere than in the District of Columbia only against officials

nessee Valley Authority Act was a special venue statute within the meaning of the "except as otherwise provided by law" limitation on the availability of section 1391(e). Although the court discussed this aspect, it was not the basis for the court's decision.

75. 459 F.2d at 259.

76. *Id.*

77. *Id.* at 257.

78. 328 F. Supp. 1373 (D. Colo. 1971).

of "national" as opposed to "merely local" stature.[79] Since the Illinois draft board was "merely local", the court held that Section 1391(e) was unavailable to the plaintiff.

The contention of the plaintiff in both *Holicky* and *Natural Resources Defense Council* was that a basic purpose of Section 1391(e) was to make the location of a lawsuit turn primarily on the plaintiff's convenience in any case in which the defendant was a federal officer or agency. Both the Colorado District Court and the Second Circuit rejected this broad reading. Rather, the courts held, in effect, that the legislation which became Section 1391(e) had the narrow purpose of remedying the restraint on judicial review of federal administrative action which was present in the prototype fact situation that had led to its passage. In reaching their conclusion, both courts focused on the lack of any affirmative evidence that Congress had intended to abrogate the more traditional conception of venue as protection for the defendant against suit in a distant forum, when it allowed venue in the district of the plaintiff's residence. The court in *Holicky* expressed concern that had Congress considered the situation, it might have concluded that draft boards would be "unfairly burdened" if they were forced to defend law suits in the district of a registrant's residence because at the "restless age of majority," registrants were "apt to be scattered far and wide."[80] In *Natural Resources Defense Council* the Second Circuit was fearful that if all federal agencies were uniformly suable in any district in which a plaintiff might reside, "today's liberalized notions of standing" could subject an essentially local agency to suit in any federal district "from Maine to Hawaii or from Alaska to Florida" which was the residence of an organization claiming the right to sue.[81]

The decisions in *Holicky* and in *Natural Resources Defense Council* by no means announced unanimously held interpretations of Section 1391(e). For example, in *Ellingburg v. Connett*,[82] the Fifth Circuit held that a prisoner in a federal penitentiary could sue his warden in the Northern District of Texas, the district of the prisoner's residence before incarceration, even though the prison was located in, and the warden was a resident

79. *Id.* at 1375.
80. *Id.*
81. 459 F.2d at 259.
82. 457 F.2d 240 (5th Cir. 1972). *See also* Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969); Environmental Defense Fund, Inc. v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1970).

of, the Eastern District of Texas. A vigorous dissent, on the other hand, agreed with the courts in *Holicky* and *Natural Resources Defense Council* that Section 1391(e) had only been adopted to solve the indispensable superior problem, and that therefore Congress did not intend that "federal prison authorities would have to chase all over the United States at the whim of the prisoner . . . to defend such suits."[83]

One possible explanation for the result in *Ellingburg* is that the absent indispensable defendant was a resident of a district near the district in which the action was brought. However, in *Nestor v. Hershey*,[84] the D.C. Circuit allowed a plaintiff to use Section 1391(e) to bring a Missouri draft board before a court in the District of Columbia. The trouble with *Nestor* and other cases consonant with *Ellingburg* is that they do not go beyond the literal language of the statute; they do not address themselves to the central question of whether Congress intended that the convenience of the citizen-plaintiff always be given preference over that of the government defendant. To some extent, the answer has depended on the willingness of an individual court to disregard the literal language of the statute and use the legislative history of the Mandamus and Venue Act, read in the light of the traditional reasons for the existence of venue provisions, as a general interpretive tool.

2. *Actions in the Field Against a Nominal Defendant*

The problems generated by the liberal interpretation of Section 1391(e) adopted by the courts in *Ellingburg* and *Nestor* are best illustrated in *Kings County Economic Community Dev. Ass'n v. Hardin*.[85] The plaintiffs in *Kings County* brought an action against officials of the Department of Agriculture and the Federal Water Quality Administration, alleging that federally subsidized agricultural operations in the district of their own residences in California were causing serious pollution of water

83. 457 F.2d at 242.

84. 425 F.2d 504 (D.C. Cir. 1969). In *Nestor*, the plaintiff was attempting to join the Director of the Selective Service and draft boards from Maryland and Missouri in an action brought in the District Court for the District of Columbia. The case differs from *Ellingburg* in that venue was set in Washington under the "district of the defendant's residence" clause of section 1391(e) (the Director of the Selective Service was a Washington resident) rather than under the "plaintiff's residence" clause. However, there is no reason that this distinction should affect the availability of section 1391(e).

85. 333 F. Supp. 1302 (N.D. Cal. 1971).

supplies.[86] Although the activity complained of affected only that district, the action was brought in a different California district with venue based on the fact that the Department of Agriculture maintained a regional office there whose director was included as a nominal defendant.

The court, however, summarily dismissed the possibility that Section 1391(e) allowed venue to be set in any district in which the defendant maintained an office and ordered the action transferred to the district of the plaintiff's residence. It felt that, if the position urged by the plaintiffs were adopted, the Government would "now [be] deemed to be ubiquitous and that quite apart from the provisions [of Section 1391(e)] about the location of real property and the residence of plaintiffs, all that really need be done to sue *in any district in the United States* [would be] to name as 'a defendant' a subordinate departmental official residing there."[87] The court refused to believe that there was no need to allege that such official "would have discretion to do as plaintiffs pray or that he would play any role in administering the relief requested" or indeed, to allege that he ever had anything to do with the suit at all.[88] Thus, the court held that it was impossible to set venue in any district merely by naming a government officer residing therein as a nominal defendant.

3. *Criticisms of the Interpretations Given Section 1391(e) in Non-Habeas Proceedings*

What disturbed the court in *Kings County* was a variation of the same problem that disturbed the courts in *Holicky*[89] and in *Natural Resources Defense Council:*[90] if the government defendant was suable in any district in which any plaintiff resided or in which the defendant maintained subordinate employees, the federal venue statutes would become a device for allowing the plaintiff to choose not only the most convenient forum, but also the one most favorable for himself. However, the courts in *Natural Resources Defense Council, Holicky,* and *Kings County* failed to examine four significant factors which make their con-

86. The relief requested was an order that would compel the Secretary of Agriculture to consider the relationship between forms of environmental pollution and the federal farm subsidy program.

87. 333 F. Supp. at 1304 (emphasis in original).

88. *Id.*

89. *See* note 78 *supra.*

90. *See* note 71 *supra.*

clusion that Section 1391(e) was meant only to apply to the prototype fact situation less compelling.

First, although the Senate Committee on the Judiciary did warn that the Mandamus and Venue Act would "not give access to the Federal courts to an action which [could not already] be brought . . . in the . . . District of Columbia,"[91] it is not clear that the Committee meant the warning to be taken as a venue limitation. The position of the Department of Justice was that, as originally written, the mandamus section of the Act could be mistakenly interpreted so as to give the federal courts the power to review discretionary decisions made by federal administrative officers.[92] Viewed in this light, it is probable that the warning meant only that the section of the Act which became 28 U.S.C. § 1361 should not extend the power to review administrative determinations beyond the power to issue writs of mandamus already enjoyed by the District Court for the District of Columbia. It did not, therefore, mean to limit venue in the field to fact situations which would also have supported venue in Washington, D.C.

Second, the courts did not account for the Congressional realization[93] that considerations of the potential inconvenience to the defendant of having to defend in any district[94] did not really apply to a federal defendant represented by the Department of Justice which maintained United States Attorneys in every district. Because actions against federal agencies were "in essence against the United States" and because they would be defended by the Justice Department, it was the position of both Houses that "[r]equiring the Government to defend [actions in the field] would not appear to be a burdensome imposition."[95]

Third, the courts neglected to consider the availability of the principle of *forum non conveniens* embodied in 28 U.S.C. § 1404(a), the change of venue statute.[96] If the choice of venue made by the plaintiff was unduly inconvenient for the other parties or for witnesses, or if it offered the plaintiff some other

91. S. REP., *supra* note 40, at 2.
92. *See* text accompanying note 32 *supra.*
93. *See* text accompanying notes 41-42 *supra.*
94. *See* General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 275 (1922), where the Court held that the purpose of the general federal venue provisions was to "save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district." *See* note 11 *supra.*
95. S. REP., *supra* note 40, at 3; H.R. REP., *supra* note 39, at 3.
96. *See* note 8 *supra.*

"local" advantage, the action could be transferred to any other district in which venue was proper regardless of whether the plaintiff objected.[97]

Fourth, as evidenced by the Second Circuit's discussion of "today's liberalized notions of standing,"[98] the courts did not deal adequately with the interrelationship between venue and the advancing trends in other areas of the law, particularly the area of standing to challenge administrative action. The requirements for standing to review a federal administrative determination are minimal. The plaintiff must have been injured in fact by the governmental activity complained of,[99] and must arguably have been in the zone of interests protected or regulated by the statute or constitutional guarantee that he alleges to have been violated.[100] Addressing itself to the kind of interests and the level of injury necessary to confer standing in the recent case of *Sierra Club v. Morton*,[101] the Supreme Court held that more than the "special interest in conservation" claimed by an environmental protection organization was necessary to enable it to challenge the construction of a ski resort in a remote mountain valley.[102] But the Court stated that injury to the "aesthetic well-being" of any specific member or members of the organization who had actually used and supposedly would continue to use the valley in a manner inconsistent with the proposed development was injury sufficient to confer standing.[103] Thus, under

97. *See, e.g.*, Independent Fish Co. v. Phinney, 252 F. Supp. 952 (W.D. Tex. 1966).

98. *See* text accompanying note 80 *supra*.

99. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972).

100. *See, e.g.*, Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barow v. Collins, 397 U.S. 159 (1970).

101. 405 U.S. 727 (1972).

102. *Id.* at 738. *See* Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154 (1970).

103. The Court pointed out:

> The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. . . . We do not question this this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing . . . . But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.
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> . . . .
>
> . . . The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes. . . .

405 U.S. at 734-35. But the Court also suggested that had the Sierra Club alleged that any of its members would be injured, it would have had standing. *Id.* at 735-36 n.8.

this case a group like the Sierra Club has standing to review governmental activity that takes place thousands of miles away from the residence of any of its members if it can allege that a member has occasionally used the area affected by the activity and would prefer that it remain inviolate for future use.

But there is no reason to restrict the availability of Section 1391(e) merely because a plaintiff is permitted to bring an action in a district which is some distance from the district in which the activity complained of took place. If the distant plaintiff has standing to sue a local agency such as the TVA, it is because the agency's localized activities are detrimental to legally cognizable rights of the plaintiff even though the plaintiff does not live in the area immediately affected by the activity. As the requirements for standing are liberalized, it becomes increasingly important that the plaintiff be allowed to bring his action in a forum in which the cost of prosecution does not render the ability to bring the action illusory. Restricting the availability of venue provisions because of "liberalized notions of standing" is an unnecessarily rigid means of protecting the convenience of the federal defendant. By reading Section 1391(e) narrowly, courts do not recognize the possibility that even though the ruling will in some cases validly spare the federal defendant from the hardship of defending in a distant forum, in other cases it will give the agency *de facto* immunity from suit by plaintiffs who do not have the financial resources to pursue an action against a distant government officer when the government officer would not be inconvenienced at all.

The major flaw with a narrow interpretation of Section 1391(e) is that it limits flexibility in actions against federal officials when it is clear that flexibility was a major consideration in the statute's adoption. A better interpretation would result from admitting that the Government can effectively defend an action against a federal employee wherever it is brought because of the existence of United States Attorneys in every district. Any real hardship that results from holding that the Government is ubiquitous can be alleviated by transfer under the change of venue statute if such transfer is truly in the "interests of justice."[104]

D. Petitions For a Writ of Habeas Corpus

Although use of the liberalized venue and service of process

104. *See* note 8 *supra.*

provisions of Section 1391(e) has been made in suits for mandamus,[105] injunction,[106] and declaratory judgment[107] on the basis that they are "civil actions" within the meaning of the statute, it is not clear that a petition for a writ of habeas corpus will be similarly treated. There are two traditional requirements that must be met under the federal habeas corpus law before the writ can issue: 1) the body must be "in custody" within the territorial jurisdiction of the court ordering the writ,[108] and 2) the court must acquire personal jurisdiction over the custodian.[109] The problem in applying Section 1391(e) to habeas corpus actions arises largely from the second requirement. Although many of the habeas corpus actions requiring interpretation of the statute have presented intricate questions as to when and where a plaintiff was in "custody," the attempted use of Section 1391(e) was to be a means of obtaining personal jurisdiction over an absent custodian.

In the normal habeas corpus situation where a prisoner brings suit against his warden, there is no problem of obtaining personal jurisdiction over the custodian because he and his prisoner are in close proximity to each other. Therefore, Section 1391(e) has been used only in situations where military personnel, away from their units for some reason, attempt to use habeas corpus to gain release from the military by bringing suit against their absent commanding officer.[110] In *United States ex rel. Rudick*

105. *See, e.g.,* Still v. Commanding Officer, 334 F. Supp. 617 (N.D. Ala. 1971).

106. *See, e.g.,* Montilla v. Laird, 336 F. Supp. 1063 (D.P.R. 1971).

107. *See, e.g.,* Upjohn Co. v. Finch, 303 F. Supp. 241 (W.D. Mich. 1969).

108. The requirement that the body be "in custody" within the jurisdiction of the court ordering the writ was the position of the majority opinion in Ahrens v. Clark, 335 U.S. 188 (1948). Dicta in Schlanger v. Seamans, 401 U.S. 487 (1971), cast some doubt as to the rigor of this requirement. *See also* Braden v. 30th Judicial Circuit Court of Kentucky, 41 U.S.L.W. 4329 (U.S. Feb. 28, 1973), in which the Court held that petitioner, imprisoned in Alabama but subject to a detainer issued by a Kentucky court, could bring a habeas corpus action in Kentucky in order to force a speedy trial there.

109. *See* Ahrens v. Clark, 335 U.S. 188, 193 (1948) (dissenting opinion).

110. *See, e.g.,* United States *ex rel.* Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969) (soldier on leave); Switkes v. Laird, 316 F. Supp. 358 (S.D.N.Y. 1970) (soldier on leave); United States *ex rel.* Armstrong v. Wheeler, 321 F. Supp. 471 (E.D. Pa. 1970) (unattached reservist). Although none of the courts holding that habeas corpus is a civil action within the meaning of section 1391(e) discusses the matter, they indi-

v. Laird,[111] the first reported habeas corpus action employing Section 1391(e), the Second Circuit held that the statute did not allow a district court in New York to obtain personal jurisdiction over the absent "custodians"[112] who had been served with process by registered mail in the District of Columbia. The court reasoned that Section 1391(e) was concerned solely with venue. For the court to have personal jurisdiction over the custodians, they would have to be "found" in New York for the purpose of service of process.

But the court's classification of Section 1391(e) as solely a venue statute is not compelling since it clearly does allow a court to obtain personal jurisdiction over an absent party.[113] If the only impediment blocking an action for habeas corpus against an absent custodian is the inability of the court to effectuate personal jurisdiction over him, Section 1391(e) makes the action possible by providing for nationwide service of process by registered mail. As a result, the district courts in other circuits in *United States ex rel. Lohmeyer v. Laird*[114] and *United States ex rel. Armstrong v. Wheeler*[115] did not follow *Rudick* when faced with similar fact situations, and reached the opposite result. The court in *Armstrong* felt that the decision in *Rudick* had been overruled by the Second Circuit's later opinion in *Liberation News Service v. Eastland* which explicitly held that Section 1391 (e) gave a court in the field personal jurisdiction over a federal officer residing in another district.[116] The court in *Lohmeyer*, in a decision prior to *Liberation News Service*, simply did not cite *Rudick* in discussing the jurisdictional question.

In *Switkes v. Laird*,[117] a New York district court attempted to reconcile *Liberation News Service* and *Rudick*. An action for a writ of habeas corpus had been brought by a military doctor who claimed to be a conscientious objector. Named as defendants were the Secretary of Defense and the Secretary of the Army. In dismissing the action, the court explained that whereas

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rectly hold that the statute is not to be narrowly read so as to apply only to the indispensable superior prototype.

111. 412 F.2d 16 (2d Cir. 1969).

112. The court expressed some doubt whether or not the named defendants were the plaintiff's custodians, and whether the plaintiff, who was absent without leave, was in "custody" at all.

113. *See* authority cited in note 46 *supra*.

114. 318 F. Supp. 94 (D. Md. 1970).

115. 321 F. Supp. 471 (E.D. Pa. 1970).

116. 426 F.2d 1379 (2d Cir. 1970). *See* note 46 *supra*.

117. 316 F. Supp. 358 (S.D.N.Y. 1970).

Section 1391(e) would normally grant personal jurisdiction over an absent federal officer, the court in *Rudick* had found that habeas corpus was not a "civil action" as those words were used in the statute. In support of its position, the court pointed out that "[w]hile habeas corpus is often said to be 'civil,' the Supreme Court has said that this label is 'gross and inexact' and that 'the proceeding is unique.' "[118] However, the court did not state clearly what the uniqueness was that prevented habeas corpus from being a "civil action."

The uniqueness of habeas corpus was confirmed when the Supreme Court was confronted with the issue in *Schlanger v. Seamans*,[119] but the badly needed clarification was not forthcoming. Schlanger was an Air Force enlistee who had been assigned to do permissive temporary duty at Arizona State University while completing a university degree. Alleging that his contract of enlistment had been violated, he sought habeas corpus from a district court in Arizona in a suit which named as defendants the Secretary of the Air Force; the Commander of Moody Air Force Base, Georgia (Schlanger's commanding officer); and the Commander of the Air Force ROTC program at Arizona State University. Because the Commander of the Arizona State University ROTC program had no actual control over the plaintiff, the Supreme Court held that no custodians were present in Arizona and therefore the action could not be maintained. The possibility that Section 1391(e) could supply jurisdiction over the absent custodians was dismissed in a footnote which repeated the suggestion of the *Switkes* court that although habeas corpus was technically a civil suit, it was "not automatically subject to all the rules governing ordinary civil actions."[120]

The position of the Supreme Court in *Schlanger* was based largely upon the Court's earlier opinion in *Ahrens v. Clark*[121] in which a divided court held that the statute which authorized district court judges to order habeas corpus "within their respective jurisdictions"[122] made habeas corpus power "territorial." But the Court in *Ahrens* had really been concerned only with the first jurisdictional requirement for habeas corpus, that the

118. *Id.* at 362.
119. 401 U.S. 487 (1971).
120. *Id.* at 490 n.4.
121. 335 U.S. 188 (1948).
122. 28 U.S.C. § 2241 (1970).

"body" be in custody within the territorial boundaries of the jurisdiction of the court issuing the writ.[123] In using *Ahrens* to support the holding that the custodian must also be present within the jurisdiction in which the habeas corpus action is brought, the Supreme Court in *Schlanger* did not clarify whether the custodian's presence was a matter of subject matter jurisdiction, or merely that habeas corpus actions were subject to special service of process requirements that left a court without personal jurisdiction over an absent custodian.[124] One difficulty with either reason for the strictly territorial definition of habeas corpus is that the policy considerations which led the *Ahrens* majority to conclude that habeas corpus was territorial were not necessarily applicable to the question of jurisdiction over the custodian. The Court's opinion in *Ahrens* suggested that it would take "compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ."[125] However, the interest of the federal custodian in not being required to defend a habeas corpus action at a distant forum is not stronger than the interest of an ordinary federal officer in any other kind of action who is protected by venue and service of process provisions. Thus, there is no reason to treat the restriction of the habeas corpus power of district judges to "their respective jurisdictions" as a limitation as to subject matter jurisdiction. Unless the language means that there is a special personal jurisdiction requirement embodied in the habeas corpus statute which survived the passage of the Mandamus and Venue Act, there is no reason to conclude that Section 1391(e) cannot be used to obtain personal jurisdiction.

The most recent Supreme Court opinion on the subject indirectly suggests that the restriction results from the inability of a court to obtain personal jurisdiction over the custodian. In *Strait*

123. Plaintiffs in *Ahrens* were some 120 Germans who were detained on Ellis Island, New York, awaiting deportation. They brought an action in the District Court for the District of Columbia, naming the United States Attorney General as defendant. The only question before the court was whether Washington, D.C., was a proper jurisdiction for the plaintiffs' petition given that they were not in custody within the territorial boundaries of the jurisdiction.

124. The distinction is critical. Section 1391(e) makes no pretext of conferring subject matter jurisdiction on a court, but it can be used to bring a party before the court over whom the court otherwise lacked personal jurisdiction.

125. 335 U.S. at 191.

v. Laird,[126] the Court held that a California district court had jurisdiction to hear a habeas corpus action brought by a reservist against the Commanding Officer of the Reserve Officer Components Personnel Center, Fort Benjamin Harrison, Indiana. The Court did not base its decision on the availability of Section 1391(e) to obtain jurisdiction over the Commanding Officer (who was really only in charge of keeping records on reserve personnel). Instead, it chose to use the extent to which the officer used military intermediaries in California in his dealings with the plaintiff as evidence that he was present in California for the purpose of a habeas corpus proceeding. The plaintiff in *Strait* was distinguished from the plaintiff in *Schlanger* by the difference between their relationships with their respective commanding officers. Whereas Schlanger had always dealt directly with his commander in Georgia and had never had any contact with him through Arizona intermediaries, Strait never had any direct contacts with his commanding officer. All communication was through intermediaries in California. By focusing on the contacts between the custodian and California, the court implied that it was the inability to obtain personal jurisdiction over the absent custodian that normally made habeas corpus impossible when the custodian was not present in the district in which the action was brought.

If the requirement that the custodian be present in the jurisdiction in which the habeas corpus action is brought means only that there are special requirements for personal jurisdiction over him, the court's reasoning must be that those requirements have survived the adoption of the extra-territorial service of process provision of Section 1391(e) and are included within the "except as otherwise provided by law" language of the statute. But if any such personal jurisdiction requirement embodied in the habeas corpus statute exists, it exists only by implication from the basic terms of the habeas statute. Even if such implication is well founded, the legislative history of Section 1391(e) suggests that "except as otherwise provided by law" refers to certain special *venue* statutes where the limitations are explicit, such as provisions controlling the location for proceedings brought with respect to federal taxes and actions relating to immigration matters.[127]

Thus, there seems to be no reason why Section 1391(e) is not

126. 406 U.S. 341 (1972). *See also* Arlen v. Laird, 451 F.2d 684 (2d Cir. 1971).

127. S. REP., *supra* note 40, at 4.

available for habeas corpus petitions. In the most frequent habeas situation, where a prisoner attempts to obtain release from prison, the proper defendant, the prison warden, will always be present in the jurisdiction in which the prisoner is in custody. Therefore, he will always be present in the district in which the action is maintained and the use of Section 1391(e) will not be necessary to obtain personal jurisdiction over him. Where the plaintiff is a member of the armed forces who is separated from his commanding officer, two factors make the availability of the extra-territorial service of process provision of Section 1391(e) desirable. First, as in *Strait v. Laird*, the commanding officer may often be only a nominal party who will never be called to testify. Second, even if the commanding officer has active control over the plaintiff, the burden placed on him by requiring him to defend an action in a distant forum is no greater than the burden placed on any other federal defendant who is suable in the field because of the existence of Section 1391(e).

IV. CONCLUSION

The Mandamus and Venue Act of 1962 was introduced and finally adopted to allow a plaintiff to obtain judicial review of a federal administrative determination in the field when a superior residing in Washington was indispensable. However, there is no reason to limit the availability of Section 1391(e) to that prototype situation. The presence of United States Attorneys in every district makes it relatively unnecessary to use venue provisions to protect federal officers from suit in distant forums. In addition, the availability of the principle of *forum non conveniens* embodied in the change of venue statute is protection enough against "forum shopping" by the plaintiff.

Although the Supreme Court has not fully articulated its reasons, the special requirements for jurisdiction over the custodian seem to make Section 1391(e) useless in habeas corpus actions. However, the failure of the Court in *Strait v. Laird* to mention the statute at all is troublesome. The opinion seemed to indicate that the requirement that the custodian be present in the district in which the habeas corpus action was brought was a matter of personal jurisdiction over him which should have opened the way for the application of Section 1391(e). But by reaching the same result which would have been reached by the application of Section 1391(e) without mentioning the statute, the Court seems to continue to reject its use.